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No. 99-479

# In the Supreme Court of the United States

ELIZAPHAN NTAKIRUTIMANA, PETITIONER

*v.*

JANET RENO, ATTORNEY GENERAL, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Constitution prohibits the United States from authorizing the surrender of individuals for trial in a foreign tribunal through the mechanism of an executive agreement and implementing legislation.

2. Whether the judicial officer in this case properly applied principles of probable cause in authorizing petitioner's surrender.

3. Whether the United Nations Charter authorizes the United Nations Security Council to establish the International Tribunal for Rwanda.

4. Whether the district court, in the exercise of its habeas corpus jurisdiction, should have set aside the order authorizing petitioner's surrender to the Tribunal based on petitioner's assertion that the Tribunal cannot guarantee protection of his due process rights.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A39) is reported at 184 F.3d 419. The opinion of the district court denying habeas corpus relief (Pet. App. A40-A42) is unreported. The opinion of the district judge certifying that petitioner is subject to surrender (Pet. App. A43-A112) is unreported, but can be found at 1998 WL 655708. An earlier memorandum and order of a judicial officer denying the first request for certification (Pet. App. A113-A126) is reported at 988 F. Supp. 1038.

### JURISDICTION

The judgment of the court of appeals was entered on August 5, 1999. The petition for a writ of certiorari was filed on September 20, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

The United States seeks to surrender applicant to the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States (the International Tribunal for Rwanda). The United States has entered into an executive agreement providing for surrender of persons sought by the Tribunal, see Pet. App. A145-A149, and Congress has enacted implementing legislation providing that persons so sought may be surrendered to the Tribunal in accordance with the provisions of 18 U.S.C. 3181 *et seq.*, which prescribes procedures for extradition. See Pub. L. No. 104-106, Div. A, Tit. XIII, § 1342, 110 Stat. 486-487.

1. On April 6, 1994, the President of Rwanda, Juvenal Habyarimana, died in an airplane crash. The crash triggered civil unrest, including attacks primarily by members of the Hutu majority on members of the Tutsi minority, which ultimately led to the deaths of more than 500,000 persons. Pet. App. A2-A3, A76-A77. Acting pursuant to its authority under Chapter VII of the United Nations Charter, the United Nations Security Council adopted Resolution 955, which established the International Tribunal for Rwanda. *Id.* at A127. Resolution 955 provides that member states of the United Nations shall "cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal." *Id.* at A128. The Resolution contains an Annex setting out the Statute of the Tribunal, which

specifies the Tribunal's procedures and defines the offenses subject to its jurisdiction. *Id.* at A129-A144. Article 28 of that Statute specifically directs the member states of the United Nations to surrender or transfer accused individuals to the Tribunal. *Id.* at A143.

The United States participated as a member of the Security Council in the formulation of Resolution 955 and supported its adoption. The United States thereafter entered into an executive agreement with the International Tribunal governing the surrender of persons sought by the Tribunal, Pet. App. A145-A149, and Congress enacted legislation to implement the agreement, *id.* at A150-A152. See Pub. L. No. 104-106, Div. A, Tit. XIII, § 1342, 110 Stat. 486. Section 1342(a), which is set out in the note following 18 U.S.C. 3181 (Supp. IV 1998), provides:

> (a) SURRENDER OF PERSONS
>
> (1) APPLICATION OF UNITED STATES EXTRADITION LAWS—Except as provided in paragraphs (2) and (3), the provisions of chapter 209 of title 18, United States Code [18 U.S.C. 3181 *et seq.*], relating to the extradition of persons to a foreign country pursuant to a treaty or convention for extradition between the United States and a foreign government, shall apply in the same manner and extent to the surrender of persons, including United States citizens, to—
>
> (A) the International Tribunal for Yugoslavia, pursuant to the Agreement Between the United States and the International Tribunal for Yugoslavia; and

> (B) the International Tribunal for Rwanda, pursuant to the Agreement Between the United States and the International Tribunal for Rwanda.

Section 1342(a) of Public Law 104-106 thus directs that the United States shall employ the provisions of the United States Code governing extradition to foreign nations, 18 U.S.C. 3181 *et seq.*, when surrendering individuals to the International Tribunal. Section 3184 (Supp. IV 1998) of those laws provides in pertinent part:

> Whenever there is a treaty or convention for extradition * * *, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, * * * may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for * * * , issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. * * * If, on such hearing, he deems the evidence sufficient * * * he shall certify the same * * * to the Secretary of State, that a warrant may issue * * * for the surrender of such person * * *

Section 3184 accordingly makes clear that, if the International Tribunal submits a request for surrender, the matter is presented to a United States judicial officer. If the judicial officer finds the evidence sufficient to justify surrender, the judicial officer shall so certify that finding to the Secretary of State for her final discretionary determination whether to sign the sur-

render warrant. See, *e.g.*, *United States* v. *Lui Kin-Hong*, 110 F.3d 103, 109-110 (1st Cir.), stay denied, 520 U.S. 1206 (1997).

2. The International Tribunal's prosecutors have discovered evidence that petitioner, a Hutu who was the President of the Seventh Day Adventist Church in Rwanda, participated in two separate episodes of genocide arising out of events at a church complex in Mugonero, Rwanda (the Mugonero Complex) and in the Bisesero region of Rwanda. The prosecutors have prepared two indictments. The Tribunal has separately confirmed each indictment and issued a warrant for petitioner's arrest. See Pet. App. A44-A45.[1]

On June 20, 1996, the Tribunal confirmed the first indictment, which charges petitioner and others (including one of petitioner's sons, who was a doctor at the Complex) with genocide, complicity in genocide, conspiracy, and three separate crimes against humanity (murder of civilians, extermination of civilians, and inhuman acts), in violation of the Statute of the Tribunal. The indictment alleges that, following the death of Rwanda's president, petitioner encouraged fearful Tutsis to take refuge at the Mugonero Complex. There, Hutus were separated out from the assembled persons and encouraged to leave. On April 16, 1994, a convoy of armed attackers, including petitioner, came to the Complex and systematically killed or injured hundreds of Tutsis assembled there. Pet. App. A4-A5.

On September 7, 1996, the Tribunal confirmed a second indictment charging petitioner and his son with

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[1] Under Tribunal procedures, a prosecutor prepares the indictment and presents it, with supporting materials, to a Tribunal judge. The judge has the responsibility to confirm that the prosecutor established a prima facie case for each count.

genocide, complicity in genocide, conspiracy to commit genocide, and other crimes, all in violation of the Statute of the Tribunal. That indictment describes events that occurred in the Bisesero region of Rwanda. Pet. App. A5. The indictment alleges that, between mid-April and June 1994, petitioner joined convoys of armed soldiers and civilians who repeatedly searched for and attacked Tutsis, including some survivors of the Mugonero massacre, seeking refuge in the Bisesero region.

The International Tribunal's evidence consists of the statements of ten citizen eyewitnesses (summarized by the extradition judge, see Pet. App. A77-A79, A104-A112) who saw petitioner and his son participating in or planning the attacks, and two additional witnesses who saw petitioner's car or the car belonging to his son at the locations of the attacks. Gov't C.A. Br. 30-31. The witnesses knew petitioner personally or were familiar with him because of his position with the church. *Id.* at 7, 30. None of the witnesses received money or other consideration for his evidence. *Ibid.* Their statements described petitioner's participation in the April 16 massacre at the Mugonero Complex. According to the witnesses' testimony, petitioner had encouraged Tutsis to seek refuge at the Complex following the onset of violence. After their arrival, petitioner told Tutsis who sought his protection that the response would come by 9 am (when the massacre began), that they were "condemned to die," and that he could not save them. Petitioner's son, director of the Mugonero Complex hospital, separated Hutu patients, who left the hospital before the attacks began. On the morning of April 16, armed convoys arrived and attacked the Tutsis throughout the day. Witnesses stated that petitioner planned and actively participated in the attack, and one

heard petitioner urge "kill them all." Pet. App. A78, A104-A105, A106, A108, A109, A110-A111; see also Gov't C.A. Br. 8, 30-31.

The evidence also established petitioner's role in activities charged in the second indictment, which had resulted in the deaths of hundreds of Tutsis. Witnesses saw petitioner and his son driving armed attackers to the Bisesero region where Tutsis were hiding. Petitioner provided food and drink to the attackers and instructed them to kill Tutsis. Witnesses saw petitioner carrying a weapon, and one witness reported having seen petitioner personally shooting at Tutsis. Pet. App. A78-A79, A107, A110; Gov't C.A. Br. 8-9, 31. In one incident, petitioner told attacking soldiers to remove the roof of a church in which Tutsis were hiding "so that it cannot be used as a hiding place for the Tutsi 'dogs.'" Pet. App. A79; see *id.* at A107, A110.

3. On October 18, 1996, the United States filed a request on behalf of the International Tribunal for petitioner's surrender to the Tribunal. The magistrate judge denied the surrender request on two grounds. Pet. App. A113-A126. First, he concluded that the statute authorizing surrender to the Tribunal was unconstitutional in the absence of a treaty, reasoning that the surrender of individuals to a foreign power requires a treaty ratified by the President and approved by two-thirds of the Senate. *Id.* at A117- A121. He also found that the Tribunal's request did not establish probable cause. *Id.* at A121-A125.

Because decisions granting or denying certification of extraditability are not appealable, see *In re Extradition of Mackin*, 668 F.2d 122 (2d Cir. 1981), the International Tribunal submitted a renewed surrender request and provided additional evidence of probable cause. See Pet. App. A46-A49. That request added two

new declarations in response to the magistrate judge's concerns about the sufficiency of the evidence. *Id.* at A76. At a surrender hearing conducted by a district judge, petitioner renewed his constitutional objections and again challenged the Tribunal's evidence of probable cause. Petitioner conceded that the evidence on its face was sufficient to establish probable cause to hold him for surrender (June 17, 1998 Tr. 32-33), but he contended that the evidence was not reliable because the witnesses or the translators could have had reasons to fabricate their statements and the translators might not have been competent. See Pet. App. A81-A86.

The district judge considered petitioner's objections at length, Pet. App. A43-A102, and ultimately certified that petitioner was subject to surrender, *id.* at A103. The judge concluded that the Constitution does not require that the United States employ a treaty to surrender a person to a foreign tribunal. The United States can also effect a surrender by means of an executive agreement to which Congress has expressed its assent through implementing legislation. *Id.* at A59-A74. The district judge carefully evaluated the Tribunal's evidence of petitioner's involvement in the charged crimes and petitioner's challenges to that evidence. *Id.* at A75-A86. He concluded that the evidence was sufficient to establish probable cause, *id.* at A86-A98, and he rejected petitioner's speculative challenges that the witness statements and the translations lacked sufficient indicia of reliability, *id.* at A98-A101.

Petitioner sought review of the decision certifying his surrender through a petition for habeas corpus, which is the normal avenue for seeking relief from an order certifying extraditability. The district court denied the habeas corpus petition. Pet. App. A40-A42. Petitioner appealed, and the court of appeals affirmed. It first

rejected petitioner's claim that the Constitution requires that his surrender be effected only by treaty. *Id.* at A7-A13. The court of appeals ruled that the Constitution does not explicitly require a treaty for extradition or require a treaty in lieu of any other form of international agreement. *Id.* at A8, A11-A12. It noted that this Court has stated that the Executive's authority to extradite may derive from a treaty *or* a statute. *Id.* at A8-A10, A12 (citing, *e.g.*, *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5, 9 (1936)). The court of appeals additionally ruled that historical practice did not demonstrate that an extradition treaty is constitutionally required, and it rejected petitioner's other constitutional arguments. *Id.* at A12-A13.

The court of appeals also rejected petitioner's contention that the Tribunal's evidence was insufficient to establish probable cause to believe that petitioner committed the charged crimes. Pet. App. A14-A17. It declined to revisit the district judge's credibility findings or his rejection of petitioner's argument that the translators could have been biased or incompetent. *Id.* at A18-A20. The court of appeals also declined to reach petitioner's contentions that the United Nations lacked the authority to establish the Tribunal and that the Tribunal cannot guarantee petitioner a fair trial. *Id.* at A20-A21.[2]

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[2] A concurring judge expressed his doubts about the persuasiveness of the evidence that the Tribunal had produced to demonstrate petitioner's complicity in the charged crimes and urged the Secretary of State to scrutinize the evidence closely when deciding whether to sign the surrender warrant (Pet. App. A21-A22). The third judge dissented, expressing the view that Pub. L. No. 104-106, Section 1342(a), is unconstitutional (Pet. App. A22-A39).

## ARGUMENT

Petitioner seeks this Court's review of four contentions: (1) the Constitution forbids the United States from surrendering an individual to stand trial in a foreign tribunal unless the surrender is accomplished pursuant to a treaty to which the Senate has given its advice and consent (Pet. 4-17); (2) in certifying that petitioner is subject to surrender, the district court employed an incorrect measure of probable cause (Pet. 17-20); (3) the United Nations lacked authority to create the International Tribunal (Pet. 21-26); and (4) the International Tribunal cannot adequately protect petitioner's due process rights (Pet. 26-30). The court of appeals correctly rejected those contentions. Its decision, which is not in conflict with any decision of this Court or another court of appeals, does not present any issue warranting this Court's review.

1. Petitioner contends (Pet. 4-17) that the Constitution bars the United States from surrendering an individual to stand trial in a foreign tribunal unless the United States bases its legal authority to accomplish the surrender on a treaty made by the President with the advice and consent of the Senate. The court of appeals properly rejected that claim. As the court noted, "the power to surrender is clearly included within the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers." Pet. App. A8 (quoting *Terlinden* v. *Ames*, 184 U.S. 270, 289 (1902)). But as that court further explained (*id.* at A8-A11), the United States may also derive its authority to surrender an individual from legislation authorizing that action. See *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5,

9 (1936); *Grin* v. *Shine*, 187 U.S. 181, 191 (1902); *Terlinden*, 184 U.S. at 289.

The Court stated in *Valentine* that the Executive Branch must have legal authorization to exercise the "national power" of extradition, but such authorization can be in the form of a treaty or a statute:

> [T]he constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law. There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law. It necessarily follows that as the legal authority does not exist save as it is given by act of Congress or by the terms of a treaty, it is not enough that statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power.

*Valentine*, 299 U.S. at 9. Accord *Grin*, 187 U.S. at 191 ("Congress has a perfect right to provide for the extradition of criminals in its own way, with or without a treaty to that effect, and to declare that foreign criminals shall be surrendered upon such proofs of criminality as it may judge sufficient."); *Terlinden*, 184 U.S. at 289 ("In the United States, the general opinion and practice have been that extradition should be declined in the absence of a conventional or legislative provision."); cf. *In re De Giacomo*, 7 F. Cas. 366, 370 (S.D.N.Y. 1874) No. 3747 (Blatchford, J.) ("if there be any want of power to deliver [the fugitive] up, it must be found in a constitutional restriction upon the power to make a treaty, or to pass a statute, covering extradition for a crime previously committed"). Although the Court's decisions in *Valentine*, *Grin*, and *Terlinden* did not involve challenges to legislation authorizing

extradition, the Court's reasoning in those decisions correctly states the controlling legal principle on that subject, and no court of appeals has reached a contrary conclusion. See Pet. App. A59-A74 (decision of the district judge comprehensively discussing the issue).

The court of appeals correctly rejected petitioner's argument that historic practice requires the use of a treaty to surrender individuals to stand trial abroad. See Pet. App. A12-A13. The United States has traditionally employed treaties as a means of providing for extradition, but that practice does not preclude the government from undertaking an executive agreement to be implemented pursuant to a statute as a mechanism for effecting surrender. This Court's decisions in *Valentine*, *Grin*, and *Terlinden* reflect the historical understanding that Congress may authorize surrender through legislation. Indeed, as early as 1821, the Attorney General had expressed the same view. See 1 Op. Att'y Gen. 509, 521 (1821) ("A treaty or an act of Congress might clothe [the President] with the power to arrest and deliver up fugitive criminals from abroad.").

In this case, the President has determined that the United States should assist the International Tribunal in identifying those responsible for committing atrocities in Rwanda, and it has authorized an executive agreement setting out the terms under which such assistance shall be provided. See Pet. App. A145-A149.[3] Congress has expressly endorsed that course of

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[3] This Court has long upheld the President's power under the Constitution to enter into executive agreements with foreign powers. See, *e.g.*, *United States* v. *Pink*, 315 U.S. 203, 228-230 (1942); *B. Altman & Co.* v. *United States*, 224 U.S. 583, 601 (1912); *Field* v. *Clark*, 143 U.S. 649 (1892).

action through implementing legislation. See *id.* at A150-A152. "When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case the executive action 'would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.'" *Dames & Moore* v. *Regan*, 453 U.S. 654, 668 (1981) (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

2. Petitioner contends (Pet. 17-20) that the Court should grant review to determine whether judicial officers should evaluate requests for extradition under the same "totality of the circumstances" test for probable cause that judicial officers employ in other law enforcement contexts. See *Illinois* v. *Gates*, 462 U.S. 213, 238-240 (1983); see also *Gerstein* v. *Pugh*, 420 U.S. 103, 120-122 (1975). There is no need for such review, as it is settled that the probable cause standard that the judicial officer applies in extradition proceedings is the same probable cause standard that a judicial officer applies in other contexts. See Pet. App. A14, A75, A86-A87; *Fernandez* v. *Phillips*, 268 U.S. 311, 312 (1925) (Holmes, J.); *Charlton* v. *Kelly*, 229 U.S. 447, 459-460 (1913); *Glucksman* v. *Henkel*, 221 U.S. 508, 512 (1911); *Benson* v. *McMahon*, 127 U.S. 457, 462-463 (1888); *Lopez-Smith* v. *Hood*, 121 F.3d 1322, 1324 (9th Cir. 1997); *Bovio* v. *United States*, 989 F.2d 255, 258-259 (7th Cir. 1993); *Escobedo* v. *United States*, 623 F.2d 1098, 1102 n.5 (5th Cir.), cert. denied, 449 U.S. 1036 (1980).[4]

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[4] The district judge noted that, when conducting the probable cause inquiry, judicial officers have not followed a uniform rule

The district judge in this case considered the totality of the circumstances in concluding that there was probable cause to believe that petitioner had committed the charged offenses. See Pet. App. A75-A86. The district judge not only evaluated the evidence that the government offered, *id.* at A75-A80, but he also considered petitioner's challenges to its reliability, *id.* at A80-A86. The district judge concluded that the statements of the witnesses were reliable, noting in particular that the witnesses were ordinary civilians, they were not informants and had not been rewarded for their evidence, their various accounts were generally consistent, and the Tribunal's investigator was able to corroborate many of their statements. See *id.* at A77-A80, A96-A101.

The district judge found no reason to discount the ability or impartiality of the interpreters. He observed that the Tribunal's investigator used the same interpreters, observed their performance during the interviews, and was generally able to converse with witnesses through those interpreters. See Pet. App. A99-

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respecting the admission of evidence challenging the credibility of the requesting state's witnesses. See Pet. App. A89-A93. There is no "uniform rule" because judicial officers have discretion to consider evidence submitted by the defendant "explaining matters referred to by the witnesses for the Government." *Charlton*, 229 U.S. at 461. This Court's recognition that magistrates have discretion to consider such evidence is consistent with the Court's guidance, in other contexts, respecting the probable cause inquiry. See, *e.g.*, *Gates*, 462 U.S. at 232 ("probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules"); *Gerstein*, 420 U.S. at 120 (noting that probable cause "traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof").

A100. Moreover, one of the witnesses who strongly incriminated petitioner gave his statement in French without interpretation. *Ibid.* In light of those circumstances, the district judge was entirely justified in rejecting petitioner's suppositions, without any supporting evidence, that the witnesses lied or that the translators could not be trusted. Instead, he properly concluded that petitioner's "litany of questions and speculations" were issues for cross-examination at the criminal trial. *Id.* at A98-A99. There is no basis for further review of that decision.

3. Petitioner contends (Pet. 21-26) that the United Nations Security Council lacks the authority under the United Nations Charter to establish the International Tribunal. The courts below properly declined to reach that issue. See Pet. App. A20-A21, A101-A102. In any event, there is no merit to petitioner's claim.

We note at the outset that the United States, as a member of the United Nations and a signatory to the Charter, recognizes the Security Council's authority to create the Tribunal. Indeed, the United States, a permanent member of the Security Council, voted to establish it. The United Nations General Assembly, which includes all member states that ratified the Charter setting out the United Nations' authority, similarly signified its agreement that the Security Council has the authority to create the Tribunal by electing the Tribunal's judges and appropriating funds for the Tribunal's operations. See Gov't C.A. Br., Addendum E at 4 & n.14. As this Court has observed, "[t]he practice of treaty signatories counts as evidence of the treaty's proper interpretation, since their conduct generally evinces their understanding of the agreement they signed." *United States* v. *Stuart*, 489 U.S. 353, 369 (1989).

But more fundamentally, the question whether the United Nations properly exercised its authority in creating the Tribunal is not a matter for the courts to decide. The Executive and Legislative Branches of the United States have clearly accepted the United Nations' authority to create the International Tribunal by virtue of their respective decisions to enter into an executive agreement and implementing legislation facilitating the Tribunal's operation. The district judge properly deferred to that political judgment, finding the issue was beyond the reach of the court. He explained (Pet. App. A101-A102):

> [T]he Court will not engage in this inquiry any more than it would engage in an inquiry of whether a foreign sovereign's courts were properly authorized under its own constitution. See *Terlinden*, 184 U.S. at 289 ("It would be impossible for the Executive Department of the government to conduct our foreign relations with any advantage to the country, and fulfill the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its Constitution and laws, to make the engagements into which he entered.").

The court of appeals concurred in that judgment. *Id.* at A20-A21. Just as the Executive Branch has authority, to the exclusion of the Judicial Branch, to recognize the territorial and legal sovereignty of a foreign government, the Executive Branch likewise has authority to pass on the legitimacy of a body established by the

United Nations.[5] It would be an unwarranted departure from the Judicial Branch's traditional restraint if the courts attempted to supervise the decisions of the United Nations or to confine the United Nations to what they believe to be its lawful jurisdiction, for such actions would directly interfere with the Executive Branch's conduct of foreign relations.

4. Finally, petitioner contends (Pet. 26-30) that the courts should not have certified his surrender to the Tribunal because, in petitioner's view, the Tribunal cannot protect his fundamental rights. There is no legal or factual basis for that claim.

It has long been established that even "[w]hen an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people." *Neely* v. *Henkel*, 180 U.S. 109, 123 (1901). It is also well settled in extradition law that a United States court cannot inquire into the fairness of the requesting state's processes:

> Under the rule of non-inquiry, courts refrain from 'investigating the fairness of a requesting nation's justice system,' and from inquiring 'into the procedures or treatment which await a surrendered fugitive in the requesting country.' The rule of non-inquiry, like extradition procedures generally, is

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[5] See *Baker* v. *Carr*, 369 U.S. 186, 212 (1962) ("recognition of foreign governments so strongly defies judicial treatment that * * * the judiciary ordinarily follows the executive as to which nation has sovereignty"); *Can* v. *United States*, 14 F.3d 160, 163 (2d Cir. 1994) ("It is firmly established that official recognition of a foreign sovereign is solely for the President to determine, and 'is outside the competence' of courts.") (citing cases).

> shaped by concerns about institutional competence and by notions of separation of powers. It is not that questions about what awaits the relator in the requesting country are irrelevant to extradition; it is that there is another branch of government, which has both final say and greater discretion in these proceedings, to whom these questions are more properly addressed.

*United States v. Lui Kin-Hong*, 110 F.3d at 110-111 (citations omitted). Those principles are fully applicable to the International Tribunal, created by the Security Council with the support of the United States, which has requested petitioner's surrender in this case.

As a factual matter, the rights of the accused before the Tribunal, which are explicitly provided in the Statute of the Tribunal (Pet. App. A140-A141), meet international norms (see Gov't C.A. Br., Addendum E at 5) and protect the ability of a person accused by the Tribunal to receive a fair trial. Petitioner alleges that, in fact, the Tribunal is dysfunctional and, because of the political situation in Africa, unable to guarantee the rights set out in the statute. There is nothing in the record to suggest, however, that the Tribunal would be unable or unwilling to afford him a fair trial.

In any event, petitioner's allegations do not provide grounds for a court to deny certification for surrender. The extradition statute, 18 U.S.C. 3184 (Supp. IV 1998), specifies what may be considered in an extradition proceeding, and it does not include such things as the adequacy of the institutions in the requesting forum. As the district court properly found (Pet. App. A102), the issues that petitioner has raised in the judicial forum, including his allegations respecting whether the Tribunal will follow the law or will protect his rights,

are factors to be considered by the Secretary of State as part of her "exclusive power to conduct foreign affairs." *In re Extradition of Manzi*, 888 F.2d 204, 206 (1st Cir. 1989) cert. denied, 494 US. 1017 (1990) (citing cases). Following certification that there is sufficient "evidence of criminality" to warrant surrender, the Secretary of State will review whatever humanitarian claims petitioner may raise and will make a final determination whether surrender is warranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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